Sumeria Enterprise Sdn Bhd v Seberai Majuharta Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 22-419-90
WAN YAHYA J
27 JANUARY 1995

Civil Procedure *— Pleadings — Matters to be pleaded — Evidence introduced by plaintiff — Whether defendant's denial of evidence a surprise — Rules of the High Court 1980 O 18 r 7(1)*

Contract *— Variation — Whether letter of confirmation varied by another letter — Whether plaintiff had fulfilled contractual obligations*

The defendant sought the service of the plaintiff in finding a contractor for a building project who would provide financing facilities to the supplier or the subcontractor by way of a letter of credit. In a letter of confirmation written by the defendant to the plaintiff, the defendant had nominated P as the main contractor and a certain subcontractor A to be appointed by the plaintiff. It was mentioned there that the letter of credit should be opened by P to A.

However, the defendant later changed its mind and L was nominated as the subcontractor instead of A and P opened the said letter of credit for another company.

The plaintiff claimed against the defendant for the facilitating fee for procuring a contractor for the building project. The defendant denied that the plaintiff's appointment of contractor and the opening of letter of credit were done under the terms and in accordance with the said letter of confirmation.

The issue was whether there was a contract between the plaintiff and the defendant and if so was the defendant in breach of it, ie whether the plaintiff had fully performed its contractual obligations by appointing L instead of A as the subcontractor.

During the trial, the plaintiff produced another letter from L to the plaintiff to show that the said letter of confirmation had been substituted by this other letter. This other letter from L to the plaintiff confirmed their obligation to pay for the service rendered by the plaintiff in securing the subcontract work from P. The plaintiff claimed that this letter from L was an indication of the defendant's agreement to vary the terms of the agreement in relation to the change of appointment of L instead of A. The defendant however said that this letter was not a variation but a substitution of the entire agreement. The plaintiff objected to defendant putting forward this argument because it was not pleaded.

Held, allowing the defendant's counterclaim:

(1) There was no verbal consent to any variation of the letter of confirmation.

(2) The issue of the letter from L had been generally pleaded by the defendant. The plaintiff was far from being surprised. It was the plaintiff who produced the document at trial despite initial objection of the defendant. In getting the letter admitted and subsequently raising the issue on pleading, the plaintiff was technically getting the court to accept its version of the document and at the same time denying the defendant the right to challenge the document by eliciting evidence to the contrary. This technical objection, if upheld, would result in serious injustice to the defendant.

(3) Even if there was a radical departure from the pleading, such departure was the result of the plaintiff's own deliberate act and therefore not open to subsequent objection.

(4) The letter from L was in fact a substitution of the letter of confirmation.

[Bahasa Malaysia summary

Defendan telah meminta khidmat plaintif untuk mencari kontraktor untuk satu projek pembinaan yang boleh memberikan kemudahan pembiayaan kepada pembekal atau kontraktor kecil menerusi surat kredit. Di dalam surat pengesahan yang ditulis oleh defendan kepada plaintif, defendan telah menamakan P sebagai kontraktor utama dan suatu kontraktor kecil A untuk dilantik oleh plaintif. Di dalam surat itu dinyatakan bahawa surat kredit itu harus dibuka oleh P kepada A.

Walau bagaimanapun, defendan kemudiannya bertukar fikiran dan L telah dinamakan sebagai kontraktor kecil mengambil tempat A dan P pun membuka surat keredit itu untuk U.

Plaintif membuat tuntutan terhadap defendan untuk fee kerana mencari kontraktor untuk projek pembinaan itu. Defendan menafikan bahawa perlantikan kontraktor oleh plaintif dan pembukaan surat kredit itu telah dibuat di bawah syarat dan mengikut surat pengesahan itu.

Isu yang timbul adalah sama ada terdapat kontrak di antara plaintif dan defendan dan jika ada, adakah defendan telah mengingkari kontrak itu, yakni sama ada plaintif telah menjalankan sepenuhnya obligasinya di bawah kontrak itu melalui perlantikan L dalam tempat A sebagai kontraktor kecil.

Semasa perbicaraan, plaintif mengemukakan satu surat lain dari L kepada plaintif untuk menunjukkan bahawa surat pengesahan itu telah digantikan dengan surat yang lain itu. Surat yang lain itu dari L kepada plaintif mengesahkan obligasinya untuk membuat bayaran untuk perkhidmatan yang telah diberikan oleh plaintif

dalam mendapatkan kerja kontrak kecil dari P. Plaintif mendakwa bahawa surat dari L ini adalah satu tanda persetujuan defendan mengubah syarat persetujuan berkenaan dengan perlantikan A. Defendan, walau bagaimanapun, mengatakan bahawa surat itu bukanlah satu perubahan tetapi satu penggantian keseluruhan persetujuan itu, surat pengesahan itu dengan surat dari L itu. Plaintif membuat bantahan terhadap pengemukaan hujah ini oleh defendan kerana ianya tidak dijadikan pliding.

Diputuskan, membenarkan tuntutan balas defendan:

(1) Tidak terdapat persetujuan lisan kepada apa-apa perubahan surat pengesahan itu.

(2) Isu tentang surat dari L telah secaranya dijadikan pliding oleh defendan. Plaintif jauh daripada dikejutkan. Plaintiflah yang mengemukan dokumen itu di perbicaraan walaupun terdapat bantahan awal oleh defendan. Dengan mengemukakan surat itu dan kemudiannya menimbulkan isu tentang pliding, plaintif secara teknikal sedang cuba memujuk mahkamah supaya menerima versi dokumen itu dan pada masa yang sama menafikan defendan hak untuk mencabar dokumen itu dengan mengemukakan keterangan sebaliknya. Bantahan teknikal ini, jika dibenarkan, akan mendatangkan ketidakadilan yang serius kepada defendan.

(3) Biarpun terdapat penyelewengan yang radikal daripada pliding, penyelewengan sedemikian adalah kesan daripada tindakan sengaja plaintif dan oleh itu tidak boleh dibantah kemudiannya.

(4) Surat dari L sememangnya adalah satu penggantian surat pengesahan itu.]

Notes

For cases on matters to be pleaded, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2546–2556; [1995] *Mallal's Digest* 288.

For cases on variation of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2293–2294; [1994] *Mallal's Digest* 827–828; [1995] *Mallal's Digest* 602–605.

Cases referred to

KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10 (refd)

Playing Cards (M) Sdn Bhd v China Mutual Navigation Co Ltd [1980] 2 MLJ 182 (refd)

Superintendent of Land and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185 (refd)

Guru S Johal and *Kuldip Singh* (*Nashir Johal & Co*) for the plaintiff.
Veronica Selvanayagy (*Dason & Co*) for the defendant.

Wan Yahya J: The plaintiff's claim against the defendant is for the sum of RM1.5m being the alleged 'facilitating' fee for procuring a contractor for the housing development project of the defendant on Lots 602–3, 681–3, 974, 1346–7 and 1541, mukim 20, Kubang Semang, Daerah Seberang Perai Tengah, Pulau Pinang (hereinafter called 'the said project').

The defendant denies that the appointment of the contractor, the subcontractor and the opening of the letter of credit were done under the terms and in accordance with the letter of confirmation written by the defendant's director dated 25 March 1988 and the counterclaims against the plaintiff for RM100,000 being loss of use, interest and costs.

The subject matter of the dispute between the plaintiff and the defendant arises out of the letter of 25 March 1988 (bundle A p 1-A) written by the defendant to the plaintiff which reads as follows:

> The Managing Director
> Sumeria Enterprise Sdn Bhd
> Suite E, 13th Floor
> Bangunan Angkasa Raya
> Jalan Ampang
> 50450 Kuala Lumpur
>
> Dear Sir
>
> Re: Construction and completion of the proposed housing project on Lots 602-3, 681-3, 974, 1346-7 and 1541, Mukim 20, Kubang Semang, Daerah Seberang Perai Tengah, Pulau Pinang
>
> We refer to the services rendered by your company in facilitating the appointment of Pernas Construction Sdn Bhd as our main contractor for the above project as well as for providing financial assistance by way of letter of credit to Apollo Construction Sdn Bhd.
>
> We hereby confirm that in construction of the above services, we shall pay you a fee of 3% (three percent) of the sales revenue to be derived from the above subject to a maximum of RM1,500,000 (Ringgit: One Million and Five Hundred Thousand Only).
>
> We further confirm that payment shall be made as follows:
>
> 1 RM100,000 (Ringgit: One Hundred Thousand Only) shall be paid to you within 7 (seven) days from the issue of the first letter of credit by Pernas Construction Sdn Bhd to Apollo Construction Sdn Bhd.
>
> 2 The balance shall be paid proportionately and progressively based on actual sales revenue collected. Such payments shall be made to you on a monthly basis.
>
> Yours faithfully,
>
> Seberai Majuharta Sdn Bhd
>
> Sgd ...
> Director

The plaintiff states that the defendant has awarded the contract to Pernas Construction Sdn Bhd ('Percon') on the condition that Layangan Sdn Bhd ('Layangan') be appointed the subcontractor and Percon provides letter of credit not exceeding RM1.9m to assist its subcontractor. A

The plaintiff further states that pursuant to the above arrangement, the first letter of credit dated 13 July 1988 had been issued by BBMB on application by Percon for the sum of RM612,919.00 to Up-Trend Sdn Bhd (bundle A p 18) for the supply of building materials for the said project. B

Agreed facts of the case are as follows: C

(i) Percon was appointed as contractor for the project by letter dated 11 April 1988 (bundle A p 2).

(ii) Defendant did not nominate Apollo Construction Sdn Bhd (Apollo) as subcontractor for the Project.

(iii) Defendant nominated Layangan as subcontractor for the project. D

(iv) Letter of credit facilities were made available to Up-Trend Sdn Bhd by Percon for the project.

It is apparent from the evidence that defendant had experienced considerable difficulties in finding a suitable contractor for the project which comprises the construction of about 1,400 units of housing and thus sought the services of the plaintiff in finding a contractor. One of the main requirements of such contractor was that it would provide financing facilities to the supplier or subcontractor. The result of this was that the plaintiff obtained the agreement of Percon to be the contractor of the project and Percon agreed to the terms laid down by the defendant's developer to provide a letter of credit for the benefits of Layangan. E F

Consideration for this was that defendant to pay the plaintiff a maximum of RM1.5m in progressive and proportionate way depending on the gross income received from the sales of houses. Out of this RM1.5m, the defendant undertook to pay the plaintiff a sum of RM100,000 within seven days of opening of the first letter of credit in favour of the supplier. G

At first the defendant had nominated Apollo to be the subcontractor but five days later it changed its mind and nominated a wholly owned subsidiary company of Apollo called Layangan. We were told that this was due to Apollo's financial difficulties. H

Apollo subsequently obtained an order of court for a financial arrangement to pay its creditors a year later under s 176 of the Companies Act 1965. The plaintiff claims that it has not been paid any money in respect of its role in spite of numerous verbal requests. I

Subsequently this led to a winding up petition in Shah Alam High Court, Companies (Winding Up) No D4–28–31–90, which was struck

A out. As a result, a sum of RM100,000 is in the court pending further order.

So the crux of the issue for the court to decide is whether there was a contract between the plaintiff and the defendant and if there was, was the defendant in breach of it.

B In para 4 of the statement of defence, the defendant states that the moneys are not due to the plaintiff because the plaintiff has not fulfilled its obligation as contained in the letter of 25 March 1988 (p 1 bundle A). The defendant is also relying on the exh P8 — a letter written by Layangan to the plaintiff to show that the earlier letter A has been substituted with the subsequent letter P8.

C

A cursory glance of the letter of 25 March 1988 and the evidence before the court reveal what appears to be part performance of the contract by the plaintiff in that the plaintiff has successfully secured the appointment of Percon as the main contractor for the project.

D However it is in the appointment of Layangan instead of Apollo that the court has to look at when deciding whether the plaintiff has fully performed its part of the bargain.

It may be necessary at this stage to examine the evidence before the court.

E Lai Ah Chong (PW1), the project manager of the plaintiff, said Mr Pu Jang Hai (DW3), the director of the defendant, wanted Apollo to be nominated subcontractor and that there would be a possibility of Layangan being nominated as well.

Referring to the A1, he said under cross-examination that it is only a letter between the plaintiff and the defendant setting out the F terms of which the plaintiff is claiming now. In his evidence at pp 14 to 17 of the notes, he was of the view that the obligation of the plaintiff was merely to obtain the appointment of Percon as the main contractor and that the obtaining of the letter of credit for Apollo was only an additional benefit. It would also appear from his evidence that the only G thing the plaintiff was able to rely on as consideration for securing the appointment of Percon as the main contractor was the personal relationship between PW3 and the executive director of Percon.

PW3, the managing director of the plaintiff, however held a somewhat different view of the obligation. At p 57 of the notes of evidence he said:

H

> I believe in the case of normal housing project, the developer would normally have sufficient financing whether they would arrange on their own. Then they would go about ... exercising or ... on negotiated process. In this case, it was different because they wanted two things which was not quite the normal practice, one was for the main contractor to provide I L/C further to subcontractor and the other was the main contractor to subcontract the entire job to a subcontractor nominated by developer.

And further down at p 58 he added:

> During the same meeting we discuss and got on the fees to be paid to us for our service in getting Percon to accept the appointment as main contractor and to get Percon to agree to extend letter of credit facilities to subcontractor.

It is clear from the evidence of PW3 that the agreement as in A1 is strictly conditional upon firstly the appointment of Percon as the main contractor and secondly on the providing of financial assistance by way of letter of credit to Apollo.

It is not disputed that the first condition has been fulfilled but what of the second one. Layangan and not Apollo was subsequently named as the subcontractor and the letter of credit was issued to one Up Trend Bhd and no evidence was adduced by the plaintiff's company to show that the defendant's company agreed to the variation. There was only a bare allegation by PW3 that Pu Jang Hai, the director of the defendant's company, verbally agreed to this variation to Layangan, a company he claimed to be a wholly owned subsidiary of Apollo, with the object of taking over the role to be performed by Apollo. However, subsequent evidence, in particular that of DW2, shows that Layangan was not at the material time a subsidiary of Apollo and strangely enough why did DW3 not insist that the important variation be committed in writing just as it was required in writing, signed by PW1. The reason given by PW3 for this alleged variation is that Apollo was in financial difficulties and was threatened by a winding up petition. But if that was so and the parent company succumbs to its creditors, then all its subsidiaries fall equally under the control of the liquidators and suffer the same ramifications.

For these reasons and the fact that DW3 had denied saying so in court, I hold that there was no verbal consent to any variation to the term of A1 as alleged by PW4.

The introduction of P8 in court has certainly brought about an explicable unfoldment of the whole episode. P8, which is a letter from Layangan to the plaintiff, confirmed their obligation to pay M$1,000,000 for service rendered by the plaintiff in securing the subcontract work from Percon. According to the plaintiff, the agreement was a subsequent additional agreement as the first; A1 was for securing the service of Apollo, the second one, P8, was for Layangan in place of Apollo.

I find this hard to accept. Thomas Lai (PW1) had in his cross-examination, confirmed that P8 referred to the same project as in A1 and before that in the examination-in-chief, he stated that Pu Jang Hai had initially laid down a condition that Percon must accept a subcontractor to be nominated by the defendant company. As such it does not stand to reason why the defendant company who had the option to appoint the subcontractor of their choice should be happily paying a further M$1,000,000 to the M$1,500,000 mentioned in the earlier letter, especially so at that point of time Apollo had not been named as a subcontractor in the Percon contract. I do not see any logic in the suggestion of the defendant agreeing to pay M$1,500,000 for the

A appointment of Apollo as a subcontractor and then even before the event takes place, agreeing to pay a further M$1,000,000 for the appointment of another company. Why should the defendant agree to pay for the appointment of Apollo when that company was no longer required by them to be a subcontractor. If at all the defendant has to pay, it was in respect of the plaintiff's effort in getting the appointment B of Layangan and that payment, the plaintiff agreed, had been made. It is more logical to my mind, and I do so find, that P8 was made in substitution of A1 and the reduction in the two sums M$1,500,000 in respect of Apollo to M$1,000,000 in respect of Layangan is most probably reflective of the lesser efforts required to persuade Percon to C accept Layangan, a financially sounder company, instead of Apollo which was then facing a winding up petition.

The plaintiff's argument against this finding is that the defendant should be denied from raising an issue which was not pleaded in their statement of defence. True, that this issue was not specifically amplified D as pleaded in the statement of defence, but it is to my mind a very relevant matter towards answering the issue generally raised in paras 4, 5 and 6 of the statement of claim and disputed in paras 4 and 6 of the defence. It was the plaintiff who had produced P8, ex improviso, against the initial objection of the defendant in order to support their contention that the variation in the term of the agreement A1 in respect E of the appointment of Layangan in place of Apollo. The plaintiff had averred the fact in paras 4, 5 and 6 of its statement of claim and these had been denied by the defendant in paras 4 and 6 of the statement of defence. It is therefore an issue raised by the plaintiff and denied by the defendant in its pleadings. In any event it was an issue based on facts F introduced by the plaintiff in the course of hearing and in respect of which the defendant is entitled to deny. In short, the plaintiff claims that the letter P8, which was almost similarly worded as A1, is an indication of the defendant's agreement to vary only the terms of the appointment from Apollo to Layangan and the defendant saying that it was not a variation but a substitution of the entire agreement, A1 with G P8.

I am satisfied that the issue has been generally pleaded by the defendant. In *Superintendent of Land and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185, Peh Swee Chin SCJ when delivering the judgment of the court, observed the rationale in the H application of O 18 r 7(1) as follows:

> The underlying well-known rationale for requiring material facts to be pleaded is, of course, to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence, if allowed, will prejudice and embarrass or mislead the opposing party.
>
> I If a party is taken by surprise, he must object then and there at the point of time when such evidence emerges, for such evidence to be disregarded by the court, and the court will then uphold such timely objection. The court will generally however grant an adjournment if

> requested, on suitable terms as to costs etc for the pleading to be amended by the party seeking to adduce such evidence. One must bear in mind the need for an orderly adversary system of a court trial, not a chaotic harangue in a market place.

A somewhat similar view as this was expressed by Raja Azlan Shah CJ (as he then was) in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 at p 12:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been properly excluded.

In another earlier case, *Playings Cards (M) Sdn Bhd v China Mutual Navigation Co Ltd* [1980] 2 MLJ 182, Abdoolcader J said that:

> although the pleadings in this case were not very precise, both parties knew the case presented by the other and justice required that the substantive issue between the parties be considered. The appellant's claim in this case was in effect for delay in the delivery of the goods;

The plaintiff in our present case is far from being surprised. After all it was the plaintiff who produced the document P8 at the trial itself despite initial objection of the defendant.

In getting P8 admitted and subsequently raising the issue on pleading, the plaintiff was technically getting the court to accept its version of the document and at the very same time denying the defendant the right to challenge the document by eliciting evidence to the contrary.

P8 certainly did not come as a surprise to the plaintiff. At p 38 of the notes of evidence, when replying to the defendant's initial objection, counsel for the plaintiff stated:

> There should be nothing to hide. The defendant was aware of the letter. They introduced evidence on this.
>
> The letter was annexed to affidavit of the managing director of the plaintiff's company in 2831-90 from which this trial was issued. This letter comes as no surprise to anybody.

It was the plaintiff who had insisted on the admission of P8 as evidence in its case and yet the very moment it was admitted it hides behind the technicality of O 18 r 7 to deny the defendant the opportunity of challenging that evidence. To my mind, this technical objection if upheld, will result in serious injustice to the defendant.

Was there a radical departure by the defendant from the pleadings? I do not think so. The plaintiff wants this court to accept its version of P8 and to ignore absolutely the defendant's version on the same document. By producing P8 and leading evidence on it, the plaintiff must be presumed to have known and consented to the issue that could have arisen from such evidence. Even if there was a radical departure from the pleadings, such departure was the result of the plaintiff's own

A deliberate act and therefore not open to subsequent objection. At p 190 of *Superintendent of Lands and Surveys (4th Div) v Hamit bin Matusin*, the court when dealing with this aspect of departure said:

> Such evidence when given without any objection by the opposing party will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading. As was stated by the Federal Court in *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 at p 278: 'Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise.' There is, however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.
>
> The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v George Wimpey & Co Ltd* [1970] 1 All ER 474; [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau & Anor v Lau Piang Ngong*, supra, and *John G Stein & Co Ltd v O'Hanlon* [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496.
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> Therefore a court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleading cured.

Similarly in the instant case, the defendant was merely developing what it had already alleged in paras 4 and 6 of the statement of defence in reply to paras 4, 5 and 6 of the plaintiff's statement of claim.

Just as I have allowed the plaintiff to use P8 to prove their claim, ie the replacement of Layangan in satisfaction of the second condition in A1 — a variation so critical in their case — then it is only just and proper that I should, and I so hold, that the defendant was entitled to prove that the alleged variation is in fact a replaced contract between Layangan and the plaintiff.

I agree with the submission of the counsel for the defendant in that in essence the plaintiff's claim up to RM1.5m, was merely for introducing a financial intermediary. They claim that they were selected because of their expertise yet admit that this was their company's first successful effort. The evidence indicates however that they were not in the construction business or consultants but were merely brokers, who wanted a percentage of the sales proceeds. The fact that the project approval was granted in one day by the executive director of Percon shows that there was virtually no expertise displayed. There were admittedly no 'cash flow' or 'projections' prepared. Pernas Construction, a company set up to actually do construction work, is prepared to act as a lender, in the guise of a building contractor, using its high public profile and its access to funds to lend money through agents like the

plaintiff company. Its only responsibility is to make available credit of RM 1.9m (by letters of credit) and is handsomely rewarded with interest progressively, the sum of RM2.03m (being the difference between the main contract and the subcontract values) within four years.

I am persuaded to and I do so conclude that the undated letter of Layangan to the plaintiff company (P8) received by the plaintiff on 26 March 1988 was in fact the substitution of the letter agreement between the plaintiff and defendant companies (A1). That it was not a separate issue is testified by the fact that the plaintiff chose to demand payment and commence action against the defendant company only after its claim against Layangan was resolved.

I accordingly dismiss the plaintiff's claim with cost. It follows from this judgment that the defendant must succeed in their counterclaims for the RM100,000. However as the defendant had not adduced sufficient evidence on the alleged damages suffered by them in respect of the non use of the sum so deposited, I am only directing that the sum be refunded to them with interest at 8% pa from 28 August 1990 to the date of realization. The plaintiff shall also pay the cost of this counterclaim.

Order accordingly.

Reported by Victor Gidwani